INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE(S) INVOLVED	2
STATEMENT OF THE CASE	3
CONCLUSION	13
APPENDIX	14
Statutes: 29 U.S.C. §157 29 U.S.C. §158(a)	App. 1
Decision and Order (147 NLRB No. 128) dated June 30, 1964	App. 1-4
Opinion and Judgment of Court of Appeals, Fifth Circuit, dated December 22, 1966 (370 F.2d 12)	App. 5-7
Final Decree of Circuit Court of the 11th Judicial Circuit, Dade County, dated March 12, 1965.	App. 7-11
Petition for Rehearing	App. 11-17
Motion to Recall filed March 31, 1967	App. 18-24
Order on Petition for Rehearing and Motion to Recall dated April 13, 1967.	App. 25
Decree Enforcing, as Modified, an Order of the National Labor Relations Board.	App. 25-29
Objections to Proposed "Decree Enforcing as Modified, an Order of the National Labor Relations Board".	App. 29-32

CITATIONS

	Page
Cases:	
Clyde Taylor Company, 127 NLRB 103	8
Herb Stein, Inc. v. *N.L.R.B.* (C.A. 6, 1966) 368 F.2d 556	13
National Labor Relations Board v. *Brennan's, Inc.* (C.A. 5, 1966) 368 F.2d 1004	10
National Labor Relations Board v. *Scherer & Sons, Inc.* 370 F.2d 12	6
Scherer & Sons, Inc. v. *International Ladies' Garment Workers' Union, Local 415, et al.* 142 So.2d 290	7
Scherer & Sons, Inc. 147 NLRB No. 128, p. 1442. 56 LRRM 1408	1
Universal Camera Corp. v. *N.L.R.B.* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456	12
Statutes:	
National Labor Relations Act, as amended	
29 U.S.C. § 151 et seq.	2
29 U.S.C. § 157	2
29 U.S.C. § 158(a)	2
29 U.S.C.A. 158(c)	11

	Page
Constitution:	
Constitution of the State of Florida Section 12, Declaration of Rights (Florida Right to Work Law)	8
Acts:	
Wagner Act	11
Norris-La Guardia Act	11
National Labor Relations Act, as amended	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

SCHERER & SONS, INC.,
a Florida corporation,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on December 22, 1966.

OPINION BELOW

The opinion and judgment of Court of Appeals is reported in 370 F2d 12 and is printed in the Appendix[1] hereto, infra (A: 5-7). The original decision of the National Labor Relations Board reviewed by the Court of Appeals, is reported at 128 NLRB 1442, 56 LRRM 1408, and is set out in the Appendix hereto, at pp 1-4.

[1]A—Appendix to Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1966 (A: 5-7); a timely petition for rehearing (A: 11-17) was filed. Rehearing was denied on April 13, 1967 (A:25). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an employer, in the legitimate pursuit of his/its business, may, for business reasons and for business purposes and with a community of interest with all his/its employees and where there is no interference with any organizational activity of the employees,[2] request his employees to obtain a state court injunction (under state law) against informational picketing without violating Section 7 of the National Labor Relations Act (29 U.S.C. § 157)?

STATUTE(s) INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. are 29 U.S.C. § 157 and 29 U.S.C. § 158(a) and are quoted in the Appendix to this brief, pp 1.

---

[2]The Court of Appeals here found and recited, on page 2 of its per curiam decision (A:), as follows:

> "There is nothing in the record to indicate that Scherer has or is likely to interfere with any organizational activity of its employees and there is no basis for that portion of the order directing it to cease and desist from interfering with organizational efforts of its employees."

moreover, none of the Employer's employees belonged to the Union nor did any desire the Union to represent them. (J.A. 291) . . . J.A.—Joint appendix before the Court of Appeals.

STATEMENT OF THE CASE

A fairly accurate factual statement of the case, until subsequent proceedings in the Court of Appeals, is contained in the first ten paragraphs of the Board Decision (147 N.L.R.B. No. 128, A:1-4) which recites:

"On March 26, 1960, the union placed pickets in front of the employer's premises and the picketing continued for several days until it was restrained by an injunction issued by the state court.

"The plaintiffs designated in the complaint filed with the court in the injunction proceeding were 48 employees, comprising all but one of the employer's total work force.

"It is undisputed that the union did not represent any of the employer's employees and that the employer had no contractual relations for his employees with any union. The union asserts that it picketed only for informational purposes.

"Before the picketing began, the union sent a letter to the employer, stating unequivocally that the picketing which was contemplated was not intended for organizational or recognitional purposes but was to be only informational. The picket signs stated 'Scherer & Sons doing work on union garments without union contract, I. L. G. W. U., Local 415, AFL-CIO.' The picketing was peaceful, no one was molested in any way or prevented from entering the employer's premises, and no employee was deterred from working.

"After the picketing began, a meeting of employees

was held on company property, during working hours, with the knowledge of the company president. Employees were paid for the time spent at the meeting and none was reprimanded for leaving his work to attend the meeting.

"According to a floor lady, the employees agreed at the meeting to obtain legal services to stop the picketing. She related that after the meeting, she went to the employer's office and had one of the office girls call an attorney to arrange for his services. The floorlady prepared a document in the nature of a power of attorney for the employees' signatures authorizing her, in their behalf, to secure a lawyer to start legal proceedings to "get rid of the pickets."

"Thereafter, the floorlady circulated the document among the employees who signed it at their places of work. She claimed she did not ask the employer's permission to circulate the document, but assumed that he was aware of that fact.

"After the attorney received the floorlady's call, he prepared the complaint for filing in the state court and took it with him to the plant. When he arrived at the plant, he met the company president, apprised him of the purpose of his visit, and was informed by the company president that "it was all right with him." The latter then summoned the floorlady and introduced her to the attorney and then departed.

"The attorney handed the complaint to the floorlady and instructed her to have the employees read and then to sign it.

"After the floorlady and the attorney's secretary, who was a notary, had stationed themselves in a room to receive the employees as they came there to sign the complaint, the floorlady informed the employees they were ready for them. The floorlady did not feel compelled to obtain the employer's permission, although the signing of the complaint required employees to take time from their work." Emphasis ours[3]

[3]The only error in the above is the reference to a rank and file employee, Kitchens, as a *floorlady;* according to the Trial Examiner Kitchens was a "rank and file employee" (JA: 450); Counsel for the Board admitted Kitchens was not a supervisor within the Act (JA: 508). However, for the purposes of this petition, petitioner believes this immaterial. It is conceded that the employer was opposed to the picketing and desired its termination; indeed the employer later also obtained an injunction under the Florida Right to Work Law which was made permanent and upheld by Supreme Court of Florida.

The Board in its Decision and Order (56 L.R.R.M. 1408, A: 1-4) stated:

The Trial Examiner found that the action taken by the employees to restrain the picketing at the Respondent's plant was concerted activity within the purview of Section 7 of the Act, and that the Respondent unlawfully interfered with this protected concerted activity in violation of Section 8(a)(1) of the Act. More specifically, the Trial Examiner pointed to the signing of the authorization of power to Nellie Kitchens to obtain counsel to remove the picket line and the signing of the complaint to restrain the Union, as the protected concerted activity unlawfully interfered with by the Respondent. In his exceptions and supporting argument, the General Counsel contends, however, that inasmuch as the above-described activities were inspired and directed by the Respondent, they are employer activity rather than protected concerted

employee activity within the meaning of Section 7 of the Act, and, as the employees herein were afforded by Section 7 the right to refrain from participating in all activities directed toward the removal of the picket line, it was this right to refrain from such activities with which the Respondent unlawfully interfered by sponsoring the employee petition in violation of Section 8(a)(1). We find merit in the position taken by the General Counsel.

Section 7 guarantees to employees the right to decide to engage in or refrain from engaging in, activities for their mutual aid or protection. Here, however, as fully set forth by the Trial Examiner, the employees' right to refrain from engaging in activities directed against the Union was interfered with, for employees were encouraged, and in some instances directly ordered, by the Respondent to participate in activity designed to restrain the Union's picketing. We find, as contended by the General Counsel, that the Respondent, by its interference with the rights of its employees, violated Section 7 of the Act.

The Court of Appeals in its decision of December 22, 1966, 370 F2d 12 (A:5-7) in modifying the Board's Order held:

> "There is nothing in the record to indicate that Scherer has or is likely to interfere with any organizational activity of its employees and there is no basis for that portion of the order directing it to cease and desist from interferring with organizational efforts of its employees." Emphasis added

while at the same time stated that because Scherer encouraged and induced its employees to bring a suit to restrain the union from engaging in the picketing of Scherer's premises (something the employees desired to do) it (Scherer) violated the Act.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals on the single issue raised by the petitioner herein constitutes an important question of federal which has not been but should be, determined by this Court; it envelopes the rights of an employer and his/its employees to bring action(s) under State Right to Work Laws where there is a community of interest, and no interference with organizational efforts of any union . . . and, indeed, where no labor dispute even exists.

It must be remembered the Employer Scherer Petitioner herein, did later, find it wise and expedient to bring an action itself and the Respondent, N.L.R.B., in the footnote 15 on page 12 of its brief to the Court of Appeals, points out this fact but sloughs over this point. This is the case of *Scherer & Sons, Inc.* vs. *I.L.G.W.U. Local 415, et al*, 142 So. 2d 290 (Florida Supreme Court). This case is virtually the same as that filed by the employees under the Right to Work Law of the State of Florida and particular attention is called to this case and this Court is requested that it examine the opinion therein with jaundice eye. This case was sent back to the lower Court, and, it was only on March 12, after a trial on the merits, that the same was disposed of with the entry of a Final Decree, in favor of Scherer & Sons, Inc., the Respondent herein. This Decree, under the Right to Work Law, grants unto

Scherer & Sons virtually the same relief granted unto the employees in their cause, and is the law of the State of Florida as has been determined by the Supreme Court. Is the obtaining of this relief also an unfair labor practice? We think not; but it appears that the Board, in each instance, insists unjustly that the Respondent atone and make amends for something it really didn't do, and if it did, had a perfect right so to do.

Part of the law governing this situation is that as is set out in the case of *Clyde Taylor Company* 127 N.L.R.B. 103 and in *Scherer & Sons, Inc.* vs *I.L.G.W.U., et al.*, and the Florida Right to Work Law as is set out in *Section 12 of the Declaration of Rights of the Constitution of the State of Florida* as it is and has been determined by the Supreme Court of Florida. If these employees had any rights, it was the right to proceed as they desired, with or without the help (not interference) of the Respondent, and the efforts of the N.L.R.B., in this case, are a venture venturing into a new field for the purpose of expanding its majesty, and wrongfully so, for such does not serve the purpose(s) of the Act.

In Scherer's Petition for Rehearing, filed in the Court of Appeals (A:11-17) the very essence of the matter presented was sought to be determined by the Petitioner; while the Petition for Rehearing is appended hereto, Petitioner re-recites from the same the following:

The Petitioner, SCHERER & SONS, INC., in accordance with Rule 29 of the Rules of this Court, respectfully petitions this Honorable Court to reconsider its per curiam decision, filed in the above cause on December 22,

1966, and upon consideration thereof, to grant the Petitioner a rehearing upon the following grounds:

1. That, in the per curiam Opinion and Judgment filed in the above cause, we respectfully suggest that the Court overlooked the fact that an Employer,[1] in the legitimate pursuit of his/its business, may, for business reasons and for business purposes, request his employees[2]

---

[1]The Board in its Decision and Order (R: 117-120) found that alleged activity complained of was "employer activity" rather than protected concerted employer activity (R: 119), reciting:

> "The Trial Examiner found that the action taken by the employees to restrain the picketing at the Respondent's plant was concerted activity within the purview of Section 7 of the Act, and that the Respondent unlawfully interfered with this protected concerted activity in violation of Section 8(a)(1) of the Act. More specifically, the Trial Examiner pointed to the signing of the authorization of power to Nellie Kitchens to obtain counsel to remove the picket line and the signing of the complaint to restrain the Union, as the protected concerted activity unlawfully interfered with the Respondent. In his exceptions and supporting argument, the *General Counsel contends*, however, that inasmuch as the above-described activities were inspired and directed by the Respondent, *they are employer activity rather than protected concerted employee activity* within the meaning of Section 7 of the Act, and, as the employees herein were afforded by Section 7 the right to refrain from participating in all activities directed toward the removal of the picket line, it was this right to refrain from such activities with which the Respondent unlawfully interfered by sponsoring the employee petition in violation of Section 8(a)(1). *We find merit in the position taken by the General Counsel.*"

. . . . this Court found no interference with any organizational efforts of the (Scherer's) employees (page 2 of the per curiam decision) and the Union disclaims any interest (Gen. Counsel's Exhibit No. 9, R: 81).

[2]Actually the Employer and employees (all) had a community of interest as stated on page 19 of the Respondent's Brief: "Both the Employer and the employees felt that the conduct of the union was cutting down on business and jeopardizing their jobs (R: 250, J.A. 94)".

to obtain a state court injunction[3] against informational picketing, and the Employer's conduct cannot carry with it an inference of unlawful intention where there is no interference "with any organizational activity of the employees."[4]

This very Court in *National Labor Relations Board* v. *Brennan's, Inc.* C.A. 5, 368 F. 2d 1004, decided November 21, 1966, held that it must decide whether employer's conduct carried with it inference of unlawful intention so compelling that it constituted substantial evidence of unlawful motive and justified conclusion that employer was not motivated by legitimate business interests. The Court, in its per curiam decision in *Brennan*, supra, a case in which an unfair and improper discharge was alleged to have occurred, specifically recited:

> "But in addition the record discloses other vital and important considerations in that LaFleur's abusive language gave rise to significant business reasons and a legitimate business purpose which strongly support the action of the Brennan's in removing LaFleur from the main dining room.

[3]The Employer (Scherer) itself obtained a state court injunction subsequent to and shortly after that granted the employees. See: Appendix (Respondent's Brief) pages 1-4, and the decision in I.L.G.W.U. v. Scherer and Sons, Inc. et al. 188 So.2d 380, a copy of which was submitted to the Court on July 1, 1966.

[4]The Court here found and recited, on page 2 of its per curiam decision, as follows:

> "There is nothing in the record to indicate that Scherer has or is likely to interfere with any organizational activity of its employees and there is no basis for that portion of the order directing it to cease and desist from interfering with organizational efforts of its employees."

moreover, none of the Employer's employees belonged to the Union nor did any desire the Union to represent them. (J.A. 291)

> Therefore we must decide whether the conduct of Brennan's in reference to LaFleur carries with it an inference of unlawful intention which is so compelling that it constitutes substantial evidence of an unlawful motive and justifies the conclusion that Brennan's was not motivated by legitimate business interests. See American Ship Building Co. v. N.L.R.B. (380 U.S. 300, 85 S.Ct. 955), 13 L.Ed. 2d 855, 863-4 (1965). Upon a full review of the record we conclude that the above facts coupled with LaFleur's self-serving declaration that Brennan's was unlawfully motivated do not constitute substantial evidence to support the inference of anti-union animus necessary for a finding of a constructive discharge."

Furthermore, it appears there was not called to the Court's attention, or the Court overlooked, the provisions of Section 8(c) of the Act (29 U.S.C.A. 158(c)), which reads as follows:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Overlooked, as well, was the fact that there exists no labor dispute, either in the classical, traditional or any other sense (nor is what occurred in this cause a labor dispute by definition in/by either the Taft-Hartley, Wagner, Norris-La Guardia, Mediation or any other law, or de-

cision thereunder), a labor dispute being defined by Section 2(9) of the Act (29 U.S.C.A. 152(9)) as:

> "(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

The situation in this cause is not unsimilar to that in *Brennan*, supra, but rather close-akin thereto. The fact(s) remain(s), as stated in the Respondent's Brief filed in this cause and as pointed out on page 10 thereof, that "None of the Respondent's employees engaged in the picketing or a strike by reason of the picketing (TR. 7(a) and 8(a). The Union has never been certified nor recognized as the bargaining agent for the Respondent's employees at the time of the picketing (TR. 8(a)). No employee ceased work as a result of the picketing (TR. 317). Further, the Union disavows that the purpose of the picketing was for organization or recognition purposes (TR. 66: General Counsel's Exhibit No. 9)."

Most seemingly, therefore, as a matter of law, under the facts of this case, the Respondent would be entitled to have the employees do what he could have done and did later do.....get an injunction under the Florida Right to Work law as provided by the Constitution of the State of Florida. *Universal Camera Corp.* v. *NLRB.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, imposes upon Courts of Appeals the obligation to make an independent

review of the whole record, and the circumstances as hereinabove and hereinafter set out, require a denial of the Board's Petition to Enforce any of its Order. See; *Herb Stein, Inc.* v. *NLRB.*, C.A. 6, 1966, 368 F.2d 556, citing *Universal Camera*, supra.

The record clearly discloses no hostility on the Employer or interference by the Employer with rights of the employees to self organization to join labor organizations and engage in concerted activities nor does it show any discrimination practiced by the Employer against employees in order to discourage their adherence to the Union. These are the statutory criteria.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted and Petitioner prays that a writ issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit and the case set down for oral argument.

Respectfully submitted,

JOSEPH A. PERKINS
Attorneys for Petitioner
M 107 Biscayne Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Petition for Writ of Certiorari were mailed to ARNOLD ORDMAN, General Counsel, National Labor Relations Board, Washington, D. C. 20570 and THURGOOD MARSHALL, Solicitor General, Department of Justice, Washington, D. C. 20530, this_____day of May, 1967.

_____

Counsel for Petitioner

APPENDIX

"29 U.S.C. § 157. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)".

"29 U.S.C. § 158(a). It shall be an unfair labor practice for an employer—

> "(1) to interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed in section 7;"

147 NLRB No. 128

D-6163
Miami, Fla.

DECISION AND ORDER

(Number and Title Omitted)

On December 27, 1962, Trial Examiner Thomas N. Kessel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain

other unfair labor practices, and recommended that the allegations of the complaint pertaining thereto be dismissed. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report together with supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified herein.[1]

The Trial Examiner found that the action taken by the employees to restrain the picketing at the Respondent's plant was concerted activity within the purview of Section 7 of the Act, and that the Respondent unlawfully interfered with this protected concerted activity in violation of Section 8(a)(1) of the Act. More specifically, the Trial Examiner pointed to the signing of the authorization of power to Nellie Kitchens to obtain counsel to remove the picket line and the signing of the complaint to restrain the Union, as the protected concerted activity unlawfully interfered with by the Respondent. In his exceptions and supporting argument, the General Counsel contends, how-

[1]The Respondent's request for oral argument before the Board is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

ever, that inasmuch as the above-described activities were inspired and directed by the Respondent, they are employer activity rather than protected concerted employee activity within the meaning of Section 7 of the Act, and, as the employees herein were afforded by Section 7 the right to refrain from participating in all activities directed toward the removal of the picket line, it was this right to refrain from such activities with which the Respondent unlawfully interfered by sponsoring the employee petition in violation of Section 8(a)(1). We find merit in the position taken by the General Counsel.

Section 7 guarantees to employees the right to decide to engage in or refrain from engaging in, activities for their mutual aid or protection.[2] Here, however, as fully set forth by the Trial Examiner, the employees' right to refrain from engaging in activities directed against the Union was interfered with, for employees were encouraged, and in some instances directly ordered, by the Respondent to participate in activity designed to restrain the Union's picketing. We find, as contended by the General Counsel, that the Respondent, by its interference with the rights of its employees, violated Section 7 of the Act.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its

---

[2]Section 7, in pertinent part, provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall have the right to refrain from any and all such activities . . ."

[3]In this regard, we note that the Trial Examiner also concluded, at one point in his Intermediate Report, that the Respondent did interfere with its employees' "freedom to exercise their statutory right of refusal."

Order, the Order recommended by the Trial Examiner with the modifications noted below,[4] and orders that the Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as modified.

1. Delete Paragraph 1(a) of the Recommended Order and substitute therefore, as Paragraph 1(a), the following:

> "Ordering, encouraging, or otherwise inducing its employees to restrain Local No. 415, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, from peacefully engaging in lawful picketing at the premises of Scherer & Sons, Inc.,"

Dated, Washington, D. C. Jun. 30, 1964.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkens, Jr., Member
National Labor Relations Board

(SEAL)

[4]The notice attached to the Intermediate Report shall also be modified by substituting for the first paragraph therein, the following paragraph:

WE WILL NOT order, encourage, or otherwise induce our employees to restrain Local No. 415, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, from peacefully engaging in lawful picketing at our premises.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 22155

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus
SCHERER & SONS, INC.,*
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board. (Florida case.)

(December 22, 1966.)

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: The National Labor Relations Board, petitioner herein, entered its order directing that the respondent, Scherer & Sons, Inc., cease and desist from ordering, encouraging or otherwise inducing its employees to restrain a specified union or any other labor organization from peacefully engaging in lawful picketing at the premises of Scherer. The Board's order directed that Scherer cease and desist from interfering with, restraining or coercing its employees in the exercise of their right to self-organization and to post an appropriate notice. The question presented to this Court is whether substantial evidence on the record as a whole sustains the findings of

* Reported as *NLRB v. Scherer & Sons, Inc.*, 370 F.2d. 12.

the Board, and the conclusion that the conduct of Scherer as found by the Board constitutes a violation of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. We conclude that the evidence sustains the finding that Scherer ordered, encouraged and induced its employees to bring a suit to restrain the specified union from engaging in the picketing of Scherer's premises, and that such conduct is a violation of the Act. The portion of the Board's order directing Scherer to cease and desist from this conduct should be enforced.

There is no evidence to indicate that any labor union other than the one specified has undertaken to engage in picketing of the Scherer plant or that there is any likelihood of this occuring. There is no basis for the order requiring Scherer to cease and desist from any action with respect to any other union than the one which is designated in the order. There is nothing in the record to indicate that Scherer has or is likely to interfere with any organizational activity of its employees and there is no basis for that portion of the order directing it to cease and desist from interfering with organizational efforts of its employees. These portions of the order will not be enforced. *N.L.R.B. v. Laney & Duke Warehouse, Inc.*, 5th Cir. 1966, ... F.2d ...., decided December 6, 1966. The order of the Board is modified by the deletion therefrom of the portions thereof relating to other unions than the one designated in the order and to interference with self-organization of Scherer's employees. As herein modified the order of the Board will be

ENFORCED.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY — IN CHANCERY NO. 61C-1417 (Dekle)

SCHERER & SONS, INC., a Florida corporation,
Plaintiff,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415,et al.,
Defendants.

FINAL DECREE

The above cause came on for final hearing on Thursday, March 11, 1965, and the Court having heard the testimony, and being otherwise fully advised in the premises, finds:

1. That the equities in this cause are with the Plaintiff and against the Defendants, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415; INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; MIAMI JOINT COUNCIL of the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; all unincorporated voluntary associations; JAMES BELLUSO, individually and as Business Agent of said International, and/or Local 415, and/or Local 415, and/or said Miami Joint Council; HARRY METZ, individually and as Business Agent of said Inter-

national and/or said Local 415, and/or said Miami Joint Council; ROBERT GLADNICK, individually and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation.

2. That the Plaintiff has proven the allegations of the complaint, as amended, by and with clear and convincing evidence.

3. That the Plaintiff, and his employees, by the acts complained of in the complaint, and the conduct stemming therefrom, have suffered loss of earning in business and as wages and have been irreparably injured.

4. That the concerted activities of the Defendants complained of in the complaint, and the amendment thereto, are in violation of the Florida Right to Work Amendment, as is set out in Section 12 of the Declaration of Rights of the Constitution of the State of Florida, in that the acts complained of and the contract which is the subject matter of this suit, constitute both primary and secondary economic pressures by the Defendants upon the Plaintiff for the purpose of compelling the Plaintiff to execute a contract with the Defendant Union(s) and/or require the Plaintiff's employees to join said Union(s) as a condition of employment, even though none of the Plaintiff's employees are members of said Union(s), or, in the alternative, to continue to suffer losses in its business with a likelihood of a cessation thereof, all of the above being within the purview of the law of the case in this cause of action, as is defined and set out in 142

So.2d 290 and 163 So.2d 306; see also **Hescom, Inc. v. Stalvey, etc.**, 155 So.2d 3.

5. That the compulsive pressures brought to bear upon the Plaintiff, and [sic] its employees, by the Deendants, acting in concert, violate the Right to Work Amendment to the Constitution of the State of Florida, as aforesaid, and are tantamount to the taking of the Plaintiff's property without due process of law.

It is thereupon CONSIDERED, ADJUDGED, DECREED and ORDERED as follows:

1. That the Defendants, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415; INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; MIAMI JOINT COUNCIL of the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; all unincorporated voluntary associations; JAMES BELLUSO, individually and as Business Agent of said International and/or said Local 415, and/or Miami Joint Council; HARRY METZ, individually and as Business Agent of said International and/or said Local 415, and/or said Miami Joint Council; ROBERT GLADNICK, individually and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation, be, and they are hereby permanently enjoined and restrained from, in any manner, violating the Florida Right to Work Law(s), that is to say the provisions of Section 12 of the Declaration of Rights of the Florida Constitution appertaining thereto, including, but not limited to, the enforcement of any agreement, written, oral or otherwise, restraining or

attempting to restrain the Plaintiff in its pursuit of business and its production, sale, use or consumption of merchandise, or from, in any manner enforcing an agreement, written, oral or otherwise, between the Defendants and other customers of the Plaintiff which requires the cessation of, or failure to do business with the Plaintiff.

2. That the Defendants, and each of them, be and they are hereby restrained from any and all picketing in violation of the provisions of the above and foregoing paragraph one (1) and/or any violation of the provisions of Section 12 of the Declaration of Rights of the Constitution of the State of Florida pertaining to said Right to Work Law.

3. That the costs in this cause are taxed against the Defendants.

4. That the Court retains jurisdiction of this cause for the purposes of entering such further and other orders as it may deem meet and proper to enforce the provisions of this final decree and effect the purposes thereof.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 12 day of March, 1965.

HAL P. DEKLE

Circuit Court Judge

STATE OF FLORIDA)
COUNTY OF DADE)

This Copy is a true Copy of the Original on file in this Office. WITNESS my hand and Official Seal,
This 17th day of March A.D., 1965

E. B. LEATHERMAN,
Clerk Circuit Court

By MARION GRUBB D.C.

EXHIBIT 1

In The
UNITED STATES COURT OF APPEALS

For The Fifth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SCHERER & SONS, INC.,
Respondent.

PETITION FOR REHEARING

The Petitioner, SCHERER & SONS, INC., in accordance with Rule 29 of the Rules of this Court, respectfully petitions this Honorable Court to reconsider its per curiam decision, filed in the above cause on December 22, 1966,

and upon consideration thereof, to grant the Petitioner a rehearing upon the following grounds:

1. That, in the per curiam Opinion and Judgment filed in the above cause, we respectfully suggest that the Court overlooked the fact that an Employer,[1] in the legitimate pursuit of his/its business, may, for business reasons and for business purposes, request his employees[2] to obtain a state court injunction[3] against informational picketing, and the Employer's conduct cannot carry with it an infer-

---

[1]The Board in its Decision and Order (R: 117-120) found that alleged activity complained of was "employer activity" rather than protected concerted employee activity (R: 119), reciting:

"The Trial Examiner found that the action taken by the employees to restrain the picketing at the Respondent's plant was concerted activity within the purview of Section 7 of the Act, and that the Respondent unlawfully interfered with this protected concerted activity in violation of Section 8(a)(1) of the Act. More specifically, the Trial Examiner pointed to the signing of the authorization of power to Nellie Kitchens to obtain counsel to remove the picket line and the signing of the complaint to restrain the Union, as the protected concerted activity unlawfully interfered with by the Respondent. In his exceptions and supporting argument, the *General Counsel contends*, however, that inasmuch as the above-described activities were inspired and directed by the Respondent, *they are employer activity rather than protected concerted employee activity* within the meaning of Section 7 of the Act, and, as the employees herein were afforded by Section 7 the right to refrain from participating in all activities directed toward the removal of the picket line, it was this right to refrain from such activities with which the Respondent unlawfully interfered by sponsoring the employee petition in violation of Section 8(a)(1). *We find merit in the position taken by the General Counsel.*"

. . . . this Court found no interference with any organizational efforts of the (Scherer's) employees (page 2 of the per curiam decision) and the Union disclaims any interest (Gen. Counsel's Exhibit No. 9, R: 81).

[2]Actually the Employer and employees (all) had a community of interest as stated on page 19 of the Respondent's Brief: "Both the Employer and the employees felt that the conduct of the union was cutting down on business and jeopardizing their jobs (R: 250, J.A. 94)".

[3]The Employer (Scherer) itself obtained a state court injunction subsequent to and shortly after that granted the employees. See: Appendix (Respondent's Brief) pages 1-4, and the decision in L.L.G.W.U. v. Scherer and Sons, Inc. et al, 188 So.2d 380, a copy of which was submitted to the Court on July 1, 1966.

ence of unlawful intention where there is no interference "with any organizational activity of the employees."[4]

This very Court in **National Labor Relations Board** v. **Brennan's, Inc.** C.A. 5, 368 F. 2d 1004, decided November 21, 1966, held that **it must decide whether employer's conduct carried with it inference of unlawful intention so compelling that it constituted substantial evidence of unlawful motive and justified conclusion that employer was not motivated by legitimate business interests.** The Court, in its per curiam decision in *Brennan*, supra, a case in which an unfair and improper discharge was alleged to have occurred, specifically recited:

> "But in addition the record discloses other vital and important considerations in that LaFleur's abusive language gave rise to significant business reasons and a legitimate business purpose which strongly support the action of the Brennan's in removing LeFleur from the main dining room. Therefore we must decide whether the conduct of Brennan's in reference to LaFleur carries with it an inference of unlawful intention which is so compelling that it constitutes substantial evidence of an unlawful motive and justifies the conclusion that Brennan's was not motivated by legitimate business interests. See American Ship Building Co. v. N.L.R.B. (380 U.S. 300, 85 S.Ct. 955), 13 L.Ed. 2d 855, 863-4 (1965). Upon a full

---

[4]The Court here found and recited, on page 2 of its per curiam decision, as follows:

"There is nothing in the record to indicate that Scherer has or is likely to interfere with any organizational activity of its employees and there is no basis for that portion of the order directing it to cease and desist from interfering with organizational efforts of its employees."

moreover, none of the Employer's employees belonged to the Union nor did any desire the Union to represent them. (J.A. 291)

> review of the record we conclude that the above facts coupled with LaFleur's self-serving declaration that Brennan's was unlawfully motivated do not constitute substantial evidence to support the inference of anti-union animus necessary for a finding of a constructive discharge."

Furthermore, it appears there was not called to the Court's attention, or the Court overlooked, the provisions of Section 8(c) of the Act (29 U.S.C.A. 158(c)), which reads as follows:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Overlooked, as well, was the fact that there exists no labor dispute, either in the classical, traditional or any other sense (nor is what occurred in this cause a labor dispute by definition in/by either the Taft-Hartley, Wagner, Norris-La Guardia, Mediation or any other law, or decision thereunder), a labor dispute being defined by Section 2(9) of the Act (29 U.S.C.A. 152(9)) as:

> "(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employ-

> ment, regardless of whether the disputants stand in the proximate relation of employer and employee."

The situation in this cause is not unsimilar to that in **Brennan,** supra, but rather close-akin thereto. The fact(s) remain(s), as stated in the Respondent's Brief filed in this cause and as pointed out on page 10 thereof, that **"None of the Respondent's employees engaged in the picketing or a strike by reason of the picketing (TR. 7(a) and 8(a). The Union has never been certified nor recognized as the bargaining agent for the Respondent's employees at the time of the picketing** (TR. 8(a)). **No employee ceased work** as a result of the picketing (TR. 317). Further, **the Union disavows that the purpose of the picketing was for organization or recognition purposes** (TR. 66: General Counsel's Exhibit No. 9)."

Most seemingly, therefore, as a matter of law, under the facts of this case, the Respondent would be entitled to have the employees do what he could have done and did later do . . . . . get an injunction under the Florida Right to Work law as provided by the Constitution of the State of Florida. **Universal Camera Corp. v. NLRB.,** 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, imposes upon Courts of Appeals the **obligation to make an independent review of the whole record,** and the circumstances as hereinabove and hereinafter set out, require a denial of the Board's Petition to Enforce any of its Order. See: **Herb Stein, Inc.** v. NLRB., C.A. 6, 1966, 368 F.2d 556, **citing Universal Camera,** supra.

2. That the Court, in its per curiam decision, failed to give full consideration to what amounted to a ruling

by the Trial Examiner allowing General Counsel in effect to amend (J.A. 365, 369) paragraph 8(c) of the Complaint (R: 18) by changing the wording to:

> "On or about March 30, 1960, Respondent by and through its agents, ordered employees to sign said petition for injunctive relief" (J.A. 365)

as distinguished from

> "On or about March 30, 1960, Respondent ordered an employee to sign and petition for injunctive relief" (R: 18)

thereby stating a new cause of action and depriving the Respondent of due process.

Respondent, however, was permitted (J.A. 382) to have the original Answer stand as to paragraph 8(c) as amended or "particularized" (J.A. 371), the Trial Examiner stating that it was not an amendment, but fact(s) given in the form of particulars even though General Counsel moved for such an amendment at the trial (J.A. 344). Indeed, General Counsel had moved to amend the Complaint in writing (R: 474). This amendment, or particularization was objected to at the time of the trial (J.A. 365, 370) and motions to dismiss were made repeatedly (J.A. 294, 370, 371) and the objection(s) was preserved by Exception No. 32 (R: 111) in the "Exceptions to the Intermediate Report, Including Each Subdivision Thereof, and the Recommended Order or the Trial Examiner dated December 27, 1962" (R: 102, 111).

This very Court, in Russell-Newman Mfg. Co., v. NLRB, C.A. 5, December 27, 1966, ____F.2d____, reported

in 64 LRRM 2092, held that **the Board was not warranted in finding an employer violated Section 8(a)(1) of the Labor Management Relations Act where the employer received only two full days notice of General Counsel's intent to amend complaint at hearing.** In that case new charges were held to be prohibitive on the premises they were not merely refinement of pending charges. There was a denial of due process. The changeover here could hardly be called a refinement because the changeover was from a so-called one direct act of the Respondent to acts allegedly done through agent(s). An examination of **Russell-Newman**, supra, reveals a kindred relationship. Can it be said that this Respondent was not denied due process?

3. Petitioner further points out that under the rules set forth in **Universal Camera**, supra, there is no substantial evidence, or any scintilla of evidence, which would warrant such an order even where bottomed or allowed on such a negative approach as made by the Board in this cause.

WHEREFORE, Petitioner moves this Honorable Court to grant unto the Petitioner a rehearing and, upon a rehearing, vacate and set aside its per curiam decision and Opinion and Judgment entered on December 22, 1966, and enter an order denying enforcement of the Board's order in toto.

Respectfully submitted

JOSEPH A. PERKINS
Attorney for Petitioner
M-107 Biscayne Building
Miami, Florida 33130

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,155

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SCHERER & SONS, INC.,
Respondent.

MOTION TO RECALL

Comes now the Respondent, SCHERER & SONS, INC., hereinafter referred to as Scherer, and in addition to, and/or in the alternative, in supplement of its Petition for Rehearing, previously filed in this cause, moves the Court enter an order recalling and vacating its per curiam decision, Opinion and Judgment, filed in this cause on December 22, 1966, and enter, in lieu thereof, an order denying enforcement of the Board's Order in toto.

As a part of this motion, Scherer adopts the Petition for Rehearing, and the matters and things contained therein, by reference as if fully set out herein. Scherer specifically refers again to the two cases relating to legitimate business interests and due process, respectively, most recently decided by this Court.[1]

---

[1] *National Labor Relations Board* v. *Brennan's, Inc.* (C.A. 5, Nov. 21, 1966) 368 Fed. 2d 1004, and *Russell-Newman Mfg. Co.* v. *N.L.R.B.* (C.A. 5, December 27, 1966) ..... Fed. 2d ....., 64 LRRM 2092. Also with regard to matters of business judgment and economic motivation, see and compare *N.L.R.B.* v. *Atlanta Coca-Cola Bottling Company* (C.A. 5, 1961), 293 Fed. 2d 300, and *N.L.R.B.* v. *Laney and Duke Storage Warehouse Co., etc.* (C.A. 5, Dec. 6, 1966) 369 Fed. 2d 859.

With regard to the fact that no labor dispute exists[2] this Court stated in the case of **National Labor Relations Board v. R. C. Can Company**, (C.A. 5, 1964) 328 Fed. 2d 974, on pages 978 and 979, as follows:

> "(1-4) Although this is almost always a close question, we conclude that the walkout and momentary picket line was protected activity on the part of these employees. It must be recognized, of course, that in seeking to effectuate the aim of the Act — industrial peace — competing policies are at work. Since the employer is required to bargain with the representatives of the worker, it must have some assurance, first, as to the identity of that agent. More important, however, it must be able to deal with that agent as the responsible spokesman for the employees of the unit. There cannot be bargaining in any real sense if the employer has to deal with individuals or splinter groups. And just as attempted negotiations with such groups or individuals would make a mockery out of bargaining, so, too, must bargaining negotiations by a single agency be kept free from divisive pressures generated by dissident elements. On the other hand, a union is, or at least should be, a democratic device. The very reason for its existence is the existence of its members and others for whom the law says it acts. Consequently, the law should be slow to declare that members cannot speak effectively in behalf of their own organization and the aims and objectives which it collectively seeks to assert in their behalf. In these conflicting poli-

[2]See pages 4 and 5 of Petition to Rehear.

> **cies, there may be found a basis for resolution: is the action of the individuals or a small group in criticism of, or opposition to, the policies and actions theretofore taken by the organization? Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish? If it is the former, then such divisive dissident action is not protected.** N.L.R.B. v. Draper Corp., 4 Cir. 1944, 145 F.2d 199, 156 A.L.R. 989; Harnischfeger Corp. v. N.L.R.B., 7 Cir., 1953, 207 F.2d 575; Plasti-Line, Inc. v. N.L.R.B. 6 Cir., 1960, 278 F.2d 482. If, on the other hand, it seeks to generate support for and an acceptance of the demands put forth by the union, it is protected so long, of course, as the means used do not involve a disagreement with, repudiation or criticism of, a policy or decision previously taken by the union such as, for example, a no strike pledge, a cooling off period, or the like during negotiation. Western Contracting Corp. v. N.L.R.B., 10 Cir. 1963, 322 F.2d 893." (Underscoring ours)

The facts in the case at hand do not reveal a "labor dispute"; indeed, it affirmatively appears that there is "no labor dispute" and the absence of such an element precludes the exercise of Board jurisdiction. Such is the holding of the Court of Appeals for the Fourth Circuit in **N.L.R.B. v. International Longshoremen's Association** (C.A. 4, 1964) 332 Fed. 2d 992, where the Court, in Syllabus 2-4, on page 995, recited:

> "(2-4) The more important attack on the Board's jurisdiction is that we have here no "labor dispute" as the law defines it. Beyond

doubt the National Labor Relations Act, as amended, is designed "to regulate the conduct of people engaged in labor disputes." Marine Books & Stewards v. Panama S.S. Co., 362 U.S. 365, 372, 80 S.Ct. 779, 784, 4 L.Ed.2d 797 (1960). The Act is replete with references to the term "labor dispute" and section 2(9) provides a definition of this phrase.

> "(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C.A. § 152(9).

The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a "labor dispute" as defined. We think that this is the case here.

(5) Essentially, Ocean's grievance relates to actions of ILA which are political in nature. As the NLRB found ILA was implementing a "clearly defined policy calculated to eliminate trade with Cuba." Dissatisfaction with ILA's policy of refusing to work ships that have engaged in trade with Cuba does not constitute a controversy grounded in the "terms and conditions of

employment." Not every activity of a labor organization, not even every controversy in which it may become involved, is a "labor dispute" within the statutory meaning. Cf. N.L.R.B. v. Miranda Fuel Co., 326 F.2d 172, 180 (2d Cir. 1963). Terms and conditions of employment are not in dispute here. The union activity here pertains to a general political question, in which ILA shares an interest with all citizens. **It is not seeking to alter any terms or conditions of employment.**

The point relied on by ILA is not merely the absence of a labor dispute with a primary employer, as the Board's opinion states. The point is rather the absence of any "labor dispute" as the statute defines it, namely, a dispute concerning "terms or conditions of employment." The Board's decision does not squarely meet the precise issue. It touches it only obliquely by saying that there "is no merit to the Respondent's contention that this Section 8(b)(4)(B) may not be applied in the absence of a labor dispute with a primary employer." ILA's emphasis that there is no "labor dispute" within the definition, either with Ocean or Maryland Ship, is not answered. The existence of a "labor dispute," the indispensable prerequisite to jurisdiction, is simply assumed by the Board. Implied in the Board's pronouncement is the notion that whenever a union calls a work stoppage or refuses to supply labor there is a "labor dispute." We cannot accept this view." (Underscoring ours)

While it may be the prerogative of the Board to determine what language was spoken, it is the prerogative of this Court to determine whether such language amounted to an unfair labor practice within the meaning of Section 8(a)(1).[3]

At all times Scherer has questioned the jurisdiction of this Court. In paragraphs (1) and (4) of Scherer's "Answer/Response to the Petition for Enforcement of an Order of the National Labor Relations Board", filed in this cause, Scherer raised the question of jurisdiction and due process.

With regard to an independent review of the whole record, as is referred to on page 5 of the Petition for Rehearing, Scherer re-refers the Court to the **Laney** and **Coca-Cola cases** (referred to in Footnote 1 herein) again pointing out, under the case of **Universal Camera Corp. v. N.L.R.B.** 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, there is no evidence which could support the negative premises advanced by the Board. Moreover, the state court injunction obtained by Scherer, referred to in Footnote 3 on page 2 of the Petition for Rehearing, was not only affirmed by the District Court of Appeal for the Third District of Florida in 188 So.2d 380,[4] but the appeal from the District Court of Appeal for the Third District of Florida to the Supreme Court of the State of Florida was dismissed by the Supreme Court of the State of Florida on February 20, 1967. A copy of the Order dismissing the appeal is attached hereto and made a part hereof by

---

[3] *Jacksonville Paper Company* v. *N.L.R.B.* (C.A. 5, 1943) 137 F. 2d 148.

[4] A copy of said decision was submitted to this Court on July 1, 1966.

reference as if fully set out herein and is marked for identification as Exhibit No. 1.

Respectfully submitted,

JOSEPH A. PERKINS
Attorney for Respondent
M-107 Biscayne Building
Miami, Florida 33130

I hereby certify that a true copy of the foregoing Motion to Recall was mailed to ARNOLD ORDMAN, ESQ., General Counsel, National Labor Relations Board, Washington, D.C., this 31st day of March, 1967.

JOSEPH A. PERKINS
Attorney for the Respondent

[TITLE OMITTED]

(April 13, 1967)

ON PETITION FOR REHEARING AND MOTION TO RECALL

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing and the motion to recall in the above entitled and numbered cause be and each thereof are hereby DENIED.

[TITLE OMITTED]

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Jones and Brown, Circuit Judges, and Brewster, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated June 30, 1964, issued against the above-named Respondent, its officers, agents, successors and assigns. The Court heard argument of respective counsel on January 19, 1965, and has considered the briefs and transcript of record filed in this cause. On December 22, 1966, the Court, being fully advised in the premises, handed down its decision, enforcing, as modified, the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court, that Scherer & Sons, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Ordering, encouraging, or otherwise inducing its employees to restrain Local No. 415, International Ladies' Garment Workers' Union, AFL-CIO, from peacefully engaging in lawful picketing at the premises of Scherer & Sons, Inc.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their right to form, join or assist Local No. 415, International Ladies' Garment Workers' Union, AFL-CIO, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in any such activities as guaranteed in Section 7 of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post at its plant in Miami, Florida, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, of the National Labor Relations Board (Tampa, Florida), shall after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive

days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Decree of the United States Court of Appeals enforcing, as modified, an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT order, encourage, or otherwise induce our employees to restrain Local 415, International Ladies' Garment Workers' Union, AFL-CIO, from peacefully engaging in lawful picketing at our premises.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to form labor organizations, or to join or assist LOCAL 415, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, to bargain collectively through representatives of their own choosing,

and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities as guaranteed in Section 7 of the Act.

All our employees are free to become, or remain, or to refrain from becoming or remaining members of any labor organization.

SCHERER & SONS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 East Cass Street, Tampa 2, Florida (Tel. No. 223-4623) if they have any question concerning this notice or compliance with its provisions.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed decree in the above-captioned case has this day been served by first class mail on the following party at the address listed below:

Marchant, Perkins, Cook & Schenerlein
Attn: Joseph A. Perkins and
Roy M. Schenerlein, Esquires
M-107 Biscayne Building
Miami 32, Florida

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.
this 5 day of Jan. 1967

[TITLE OMITTED]

OBJECTIONS TO PROPOSED "DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Comes now the Respondent, SCHERER & SONS, INC., by its undersigned attorney, Joseph A. Perkins, and files this its objections to the proposed "Decree Enforcing, as Modified, an Order of the National Labor Relations

Board," and more specifically to paragraph 1(b) of said Decree which reads as follows:

> "(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their right to form, join or assist Local No. 415, International Ladies' Garment Workers' Union, AFL-CIO, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in any such activities as guaranteed in Section 7 of the National Labor Relations Act, hereinafter called the Act)."

and to indented paragraph 2 of the "Notice to all Employees", attached to the proposed Decree as an appendix, which said paragraph 2 reads as follows:

> "WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to form labor organizations, or to join or assist LOCAL 415, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities as guaranteed in Section 7 of the Act."

showing unto the Court as follows:

That counsel for the Respondent received a copy of the proposed Decree submitted to the Court on January 7, 1967; that as can be seen from the above paragraph 1(b) of the proposed Decree and indented paragraph 2 of the "Notice to all Employees" contains the recitation that the Respondent shall cease and desist from interfering with, etc. of its employees in the exercise of their "right to form, join . . . . ." etc.

Respondent points out to the Court that the Court found and recited in its Per Curiam Decision dated December 22, 1966, as follows:

> "There is no evidence to indicate that any labor union other than the one specified has undertaken to engage in picketing of the Scherer plant or that there is any likelihood of this occurring. There is no basis for the order requiring Scherer to cease and desist from any action with respect to any other union than the one which is designated in the order. **There is nothing** in the record **to indicate that Scherer has or is likely to interfere** with any organizational activity of its employees and there is no basis for that portion of the order directing it to cease and desist from interfering with organizational efforts of its employees." (Underscoring ours)

and accordingly, a recitation restraining the Respondent from something it has never done, and as the Court says, is not likely to do, is improper particularly inasmuch as the Court said: ". . . . there is no basis for that portion of

the order directing it to cease and desist from interfering with organizational efforts of its employees."

Moreover, Respondent has moved this Court to allow Respondent to and including February 7, 1967 within which to file its petition for rehearing and on that basis Respondent objects to the entry of any decree at this time, stating further, that Respondent and counsel are presently discussing the advisability of further proceedings in this cause in the event of a denial of our petition to rehear.

Respectfully submitted,

JOSEPH A. PERKINS
Attorney for Respondent
M-107 Biscayne Building
Miami, Florida 33130

I HEREBY CERTIFY that a true copy of the foregoing Objections to Proposed "Decree Enforcing, as Modified, an Order of the National Labor Relations Board" was mailed to MARCEL MALLET-PREVOST, Assistant General Counsel, National Labor Relations Board, Washington, D.C., this 10th day of January, 1967.

Joseph A. Perkins

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	2
Statement	2
A. The Board's Findings of Fact	2
B. The decisions of the Board and court of appeals	7
Argument	7
Conclusion	10

CITATIONS

Cases:

Clyde Taylor Co., 127 NLRB 103	9
Edward Fields, Inc. v. *National Labor Relations Board*, 325 F. 2d 754	8
National Labor Relations Board v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, certiorari denied, 342 U.S. 919	8
Retail Clerks Int'l Ass'n, Local 1625 v. *Schermerhorn*, 375 U.S. 96	9
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236	9

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*)	
Section 7	7, 9
Section 8(a)(1)	7

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1397

SCHERER & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-6) is reported at 370 F. 2d 12. The findings of fact, conclusions of law, and order of the Board (Pet App. 1-4; R. 77-101)[1] are reported at 147 NLRB 1442.

---

[1] "R." refers to Volume I of the Transcript of Record; "J.A." refers to the Joint Appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1966 (Pet. App. 5), and a petition for rehearing was denied on April 13, 1967 (Pet. App. 25). The petition for a writ of certiorari was filed on May 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth in the Appendix to the petition (Pet. App. 1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer abridged his employees' right to refrain from engaging in concerted activity by ordering and inducing them to seek a State court injunction against peaceful picketing by the union.

STATEMENT

A. The Board's Findings of Fact

Petitioner manufactures accessories for, and does cutting work on, garments produced by other manufacturers (R. 78; J.A. 401-402, 418). On March 23, 1960, Local 415, International Ladies' Garment Workers' Union, AFL-CIO, notified petitioner that it intended to commence picketing to advise petitioner's customers and the general public that petitioner was

doing work on union-made garments under conditions which were below union standards. The Union further asserted that its picketing would not have an object of unionizing petitioner's employees or obtaining recognition as their bargaining representative (R. 81; J.A. 240-241.) None of petitioner's employees were members of the Union or represented by any other labor organization (R. 81; J.A. 419-420).

Picketing began in front of petitioner's premises on or about March 26, with signs reading: "Scherer & Sons doing work on union garments without union contract, I.L.G.W.U., Local 415, AFL-CIO" (R. 81; J.A. 252, 442-443). Picketing was peaceful and no employees were appealed to or deterred from working by the pickets (R. 81-82; J.A. 121-124, 237). A few days later all of the employees attended a meeting on petitioner's premises to discuss the picketing. Although the meeting was held during working hours, none of the hourly rated employees lost any pay or was reprimanded for leaving work (R. 82-83; J.A. 452, 466, 516-518). Petitioner's president, Joseph Scherer, told the employees at the meeting that the purpose of the Union's picketing was to "get [them] to join the union" (R. 82-83; J.A. 252-253, 418).

Nellie Kitchens, who distributed work to the other employees and was highly regarded by petitioner's officers, acted as employee spokesman at the meeting (R. 82; J.A. 449-450, 465-466, 516-517). After the meeting, Kitchens requested one of petitioner's secretaries to telephone attorney Joseph Perkins, a member of the law firm retained by petitioner, and to

arrange for him to have the picketing stopped (R. 83; J.A. 520-521, 535-536). In 1959 Perkins had obtained two separate State court injunctions against picketing by the Union, one on behalf of petitioner and the other for the employees. At that time, petitioner's president had referred Kitchens to Perkins when she had requested the name of a labor lawyer. Perkins' secretary had assisted Kitchens in drafting a document, later signed by 47 employees, which had authorized Kitchens "to get a lawyer for all of us * * * to try and get rid of the pickets who are interfering with us and our bosses work." Although petitioner's attorneys ordinarily charge $50 per hour for their services, Perkins never billed the employees for representing them in their 1959 suit. Kitchens, however, had collected about $75 and had given it to Perkins (R. 83, 86-87; J.A. 20-27, 38-40, 55-67, 82-84, 501, 519, 522, 526-528, 557).

After requesting petitioner's secretary to call Perkins, Kitchens made a copy, in the secretary's office, of the 1959 employee authorization. She then circulated the authorization among the employees while they were at their work places, and they signed it (R. 83; J.A. 289, 520-525, 531, 536). In the meantime, Perkins directed his associate, Roy Schenerlein, to draft a complaint for filing in a State court. The complaint alleged, *inter alia*, that the employees were satisfied with their working conditions and that the Union was picketing in order to force them to join, and their employer to contract with, the Union, in violation of various State laws. The complaint further alleged that the picketing was

causing irreparable injury, and sought an injunction to restrain it (R. 84; J.A. 90-97, 473-474, 482, 492-493).

The next day Schenerlein went to petitioner's plant with a notary and told president Scherer he was there "to get the complaint signed" by the employees. Scherer asserted that it was "all right with him" and summoned Kitchens. Schenerlein gave the complaint to Kitchens and instructed her to have the employees read and attest to it (R. 84; J.A. 90-97, 473-474, 477-478, 482-483, 492-493). Kitchens then proceeded to one of the workrooms with the notary and an employee who acted as interpreter for the Spanish-speaking employees. On a signal from Kitchens, the employees left their work stations in groups and came to the workroom, where Kitchens explained to them that the purpose of the complaint was to "get rid of the pickets" and "the union too." Forty-eight of petitioner's 49 employees signed the complaint. Among them was foreman Nathan Kaufman, who admittedly was one of petitioner's supervisors (R. 84-85, 93; J.A. 90-99, 487, 512, 543, 545, 547-549, 555).

While the employees were signing the complaint, president Scherer approached employee Jill Clark at her work table and inquired whether she "had signed the paper." When Clark answered no, Scherer told her "to do it now." Julio Figueros, Clark's foreman, accompanied her to the table where the complaint was being signed. When Clark heard Kitchens explain that the purpose of the complaint "was to have the

pickets taken away and to keep the union out," she commented to Figueros that she "wanted to know more about it, because I didn't know anything about the union, good or bad, and that I would have liked to know some more about it." Figueros told her to "remember which side [her] bread was buttered on." Without reading the complaint, Clark signed it, because when "your boss tells you to do something, you do it" (R. 85-86; J.A. 569-576). Similarly, Seymour Scherer, petitioner's secretary-treasurer, approached employee Ann Thomas at her work place and asked her if she had "tak[en] care of the matter in the back." When Thomas said no, Scherer told told her to "do it now." Thomas then proceeded to sign the complaint (R. 86; J.A. 418-419, 577-579).

On about March 30, 1960, petitioner's counsel filed the complaint; subsequently, the State court enjoined the Union from picketing (R. 80; J.A. 100, 115-117, 128). Although petitioner's attorneys admittedly had rendered services to the employees worth $1000 or more, they never discussed fees with or billed the employees. Several employees contributed a total of $24 which covered a bond premium and certain filing costs. Attorney Perkins asserted first that "in this instance, I have worked for nothing," and then that "[w]e are looking to [the employees] who signed" for payment of "whatever the traffic will bear for right now" (R. 86-87; J.A. 288, 317, 460, 499-501, 556-565).

B. The Decisions of the Board and Court of Appeals

Upon the foregoing facts the Board found that petitioner had ordered and induced its employees to bring a State court suit to enjoin the Union's picketing. It concluded that, by such action, petitioner had interfered with the employees' right under Section 7 of the Act to refrain from engaging in concerted activity in opposition to the Union, and had therefore violated Section 8(a)(1) of the Act (Pet. App. 3; R. 92-95). The Board ordered petitioner, *inter alia*, to cease and desist from inducing its employees to restrain the Union from peacefully and lawfully picketing petitioner's premises, and from similarly interfering with their rights to engage, or to refrain from engaging, in concerted activities (Pet. App. 4; R. 98).

The court of appeals held that the evidence supported the Board's finding that petitioner had unlawfully induced its employees to restrain the Union's picketing, and enforced the Board's order, with modifications narrowing its scope (Pet. App. 5-6).

ARGUMENT

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with his employees' rights under Section 7, which include the right, not only to engage in, but to refrain from engaging in, "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, petitioner's employees had the right, free from employer interference, to take concerted

action in support of or in opposition to the Union's picketing, or to refrain from taking any concerted action at all.[2] By ordering and encouraging employees to sign a complaint seeking an injunction against the picketing, petitioner unlawfully interfered with that right, forcing its employees to take concerted action against the picketing. As the court below correctly concluded, the facts (summarized in the Statement, *supra*, pp. 2-6) fully support the Board's finding of employer instigation of the employee injunction suit.[3] In these circumstances, the decision by the court below was correct, and no issue warranting further review is presented.

Contrary to petitioner's assertion (Pet. 7-8), the Board's decision does not make it an unfair labor practice for an employer or his employees to obtain a State court injunction against union picketing al-

---

[2] See *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 760 (C.A. 3), certiorari denied, 342 U.S. 919; *Edward Fields, Inc.* v. *National Labor Relations Board*, 325 F. 2d 754, 759-760 (C.A. 2).

[3] Thus, two employees were commanded by petitioner, under circumstances leaving "no alternative * * * but to comply" (R. 92), to sign a complaint which alleged their opposition to the Union's picketing. Moreover, petitioner gave the other employees "reason to understand" that "this was what they had to do" (R. 94). It allowed Nellie Kitchens, "undoubtedly * * * regarded by employees as the hand of management" (R. 95), "freedom of the plant" (R. 93) to secure employees' support during working hours and without loss of pay; an admitted supervisor participated in the signing of the complaint; and the counsel recommended by petitioner undertook representation of the employees without charging them any fee (*supra*, pp. 3-6).

legedly violative of State law.[4] Nothing in that decision makes it unlawful for either an employer or his employees to attempt to obtain such an injunction (see *Clyde Taylor Co.*, 127 NLRB 103, 109); the decision merely bars an employer from compelling or inducing his employees to institute such a State court suit. Nor is petitioner aided by the statement of the court below (Pet. App. 6) that petitioner did not interfere "with any organizational activity of its employees." The court made this statement in the context of eliminating from the Board's order the reference to employer interference with activities of other unions and with employee "self-organization" (Pet. App. 6); it was not suggesting, as petitioner contends, that petitioner's action had no effect on its employees' Section 7 rights—*i.e.*, that it did not abridge their right to refrain from engaging in concerted action against the Union.

---

[4] Such suits, however, may be preempted by federal labor legislation. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 105.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

JUNE 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 285334 949